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No. 80-1390

In the Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS R. BELLER, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process when he was discharged from the Navy for engaging in homosexual acts without being given an explanation why the Secretary of the Navy chose not to exercise his discretion to retain petitioner.

2. Whether Navy regulations governing discharge of service members who engage in homosexual acts violate petitioner's right to privacy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-155a) is reported at 632 F. 2d 788. The opinions of the district court (Pet. App. 4a-53a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1980, and a petition for rehearing was denied on November 21, 1980 (Pet. App. 156a). The petition for a writ of certiorari was filed on February 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

10 U.S.C.1169 provides in relevant part:

> No regular enlisted member of an armed force may be discharged before his term of service expires, except
>
> (1) as prescribed by the Secretary concerned * * *.

The regulations prescribing the grounds for discharge of service members who engage in homosexual acts that were in effect when petitioner was discharged are quoted by the district court at Pet. App. 7a-9a and reproduced at Pet. App. 161a-171a. The instruction of the Secretary that is currently in effect is attached in an appendix, *infra*, 1a-9a.

STATEMENT

1. On December 19, 1975, following a hearing before an administrative discharge board at which he was represented by counsel, petitioner was ordered honorably discharged from the Navy for unfitness, because of his having engaged in homosexual acts during his Naval service (Pet. App. 10a, 69a). Navy regulations in effect at the time of petitioner's discharge required "prompt separation" for unfitness of those service members "involved in homosexual acts" (Pet. App. 8a).

Petitioner then filed the present action in the United States District Court for the Northern District of California. He alleged that (1) the Navy was attempting to breach its contract with him, (2) the Navy had violated the Privacy Act, 5 U.S.C. 552a, by permitting the administrative discharge board to predicate his involuntary separation from the Navy on records pertaining to him that had been obtained for another purpose (*i.e.*, the decision whether to grant him a Top Secret security clearance) without his consent, and (3) the discharge violated his statutory and constitutional rights to privacy and due process—specifically, the Navy's definition of "homosexual" violates substantive due process "in that [it] would include any member of the Navy who has ever even patted affectionately a member of the same sex" (R. 4).[1] Petitioner sought to

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[1] "R." refers to the record on appeal.

enjoin his discharge from the Navy, to require the Navy to expunge from his records any reference to his discharge for homosexuality, a declaration that his enlistment contract was valid, and damages under the Privacy Act (Pet. App. 69a-70a; R. 4).

The district court granted petitioner's request for a temporary restraining order preventing his discharge (Pet. App. 1a-3a), but subsequently denied his motion for a preliminary injunction (*id.* at 4a-47a). The court rejected the various jurisdictional arguments made by the Navy, including the contention that petitioner be required to exhaust administrative remedies (*id.* at 11a-26a). The court ruled, however, that petitioner had failed to show any likelihood that he would succeed in proving that the Navy either had violated the Privacy Act or had breached his enlistment contract (*id.* at 35a-36a). The court also found that petitioner had failed to demonstrate a strong likelihood of success on his claim that the Navy regulations were unconstitutionally vague and overbroad, because "there is no real question about [petitioner's] knowledge and understanding of what activity constituted homosexual conduct within the proscription of the Navy's regulations." Therefore, the court remarked, "[petitioner] lacks standing to challenge the application of the Navy's regulation to the hypothetical conduct of others, since he is well within its prohibitions" (*id.* at 38a-39a).

Thereafter, the district court granted the Navy's motion for summary judgment (Pet. App. 48a-55a), incorporating by reference parts of its previous memorandum of decision denying a preliminary injunction (*id.* at 51a).

2. Petitioner's appeal was consolidated with two other appeals involving Navy members discharged for engaging in homosexual acts (Pet. App. 57a), and the court of appeals issued a consolidated opinion (*id.* at 56a-153a). The court of appeals, as had the district court, rejected the Navy's jurisdictional arguments (*id.* at 82a-85a), including

the claim that petitioner was required to exhaust administrative remedies (*id.* at 92a-95a). It also rejected the Navy's suggestion that petitioner's action had been rendered moot by the expiration of his enlistment contract and his failure to apply for reenlistment following his discharge (*id.* at 86a-92a). The appellate court affirmed the district court's rejection of petitioner's Privacy Act claim (*id.* at 82a-83a, 135a-136a n.6) and sustained the constitutionality of the Navy's regulations on the ground that they represent "a reasonable effort to accommodate the needs of the Government with the interests of the individual" (*id.* at 128a). The court of appeals also rejected petitioner's vagueness and overbreadth claims (see *id.* at 129a).

ARGUMENT

1. Petitioner does not contend that "homosexual personnel have a Constitutional right to remain in the Armed Forces" (Pet. 17). Rather, petitioner claims that "he was entitled to articulated reasons why he should not be considered as an exception to the general policy" (*ibid.*), and he asserts that there is a conflict among the courts of appeals on the question whether due process requires the Secretary of the Navy to give reasons for declining to exercise his discretion to retain a service member who engages in homosexual acts. Further judicial review of this contention is unwarranted because the claimed conflict is largely illusory, because the Navy's regulations concerning the discharge of homosexuals have been revised to ensure equal treatment in all future cases, and because even if petitioner had been afforded the procedural rights he requests, the ultimate result would have been no different: he would have been discharged from the Navy.

Petitioner contends that there is a conflict between the decision below and the decisions in *Matlovich* v. *Secretary of the Air Force*, 591 F. 2d 852 (D.C. Cir. 1978), *Berg* v. *Claytor*, 591 F. 2d 849 (D.C. Cir. 1978), and *Champagne* v.

Schlesinger, 506 F. 2d 979 (7th Cir. 1974), concerning the entitlement of a service member who is discharged for homosexuality to an explanation of why the Secretary did not exercise discretion to retain him. We view this disagreement among the circuits as largely illusory because it arises out of the District of Columbia Circuit's misconception of the extent to which such discretion exists.[2] Both petitioner and Berg were discharged pursuant to Secretary of the Navy Instruction (SECNAVINST) 1900.9A (31 July 1972) (Pet. App. 161a-171a), which provided in pertinent part (Pet. App. 162a):

> a. General. Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential. At the same time, every safeguard must be taken to insure against unjust action that will stigmatize an innocent person.

The court below correctly construed this instruction as, standing alone, requiring the discharge of homosexuals. But the appellate court also recognized the existence of a power in the Secretary outside of this regulation to retain homosexuals in an extraordinary case of military necessity.

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[2]In *Champagne* v. *Schlesinger*, 506 F. 2d 979 (7th Cir. 1974), the court of appeals held only that the plaintiffs in that case were required to exhaust their remedies before the Board of Corrections of Naval Records. Although the *Champagne* court expressed no view either on the merits of the claims in that case or on the question whether the Navy's discharge regulations were mandatory (506 F. 2d at 984), in *Champagne*, as in the District of Columbia cases, the government broadly portrayed the Navy's discretion to retain homosexuals (see 506 F. 2d at 983-984).

Given this extremely limited discretion, it would serve no purpose to provide a statement of reasons in virtually every case explaining why the Secretary had determined not to retain a homosexual service member. As the court below observed (Pet. App. 101a-102a; footnote omitted):

> [A]n individual with an otherwise fine service record will not be retained unless the Secretary concludes his record marks him as being highly unusual or especially valuable to the Navy. This kind of consideration does not contemplate evaluating the fitness of an individual to continue military service.
>
> For our purposes, therefore, the applicable Navy practices may be summarized as follows: the Secretary will discharge a person found by a discharge board to have engaged in homosexual acts covered by the regulations. The Secretary has discretion to retain a person in rare instances, but these instances are unrelated to the fitness to serve of the particular individual or the reasons why the Navy in general discharges homosexuals.

In contrast, in *Berg* and *Matlovich* the District of Columbia Circuit erroneously, but likely in partial reliance on government representations, construed SECNAVINST 1900.9A and the Air Force's counterpart as providing for more instances than in fact exist in which the Secretary might exercise discretion to retain a service member who had engaged in homosexual acts. Accordingly, the court in those cases further found that the failure to exercise the broad discretion it perceived the Secretary to possess required him to furnish the discharged service member with a statement of reasons. *Matlovich* v. *Secretary of the Air Force, supra*, 591 F. 2d at 855-861; *Berg* v. *Claytor, supra*, 591 F. 2d at 850-851.[3] Thus, no court of appeals has dis-

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[3]In contrast to the present case and *Berg* v. *Claytor*, *Matlovich* was an Air Force discharge and, accordingly, involved a wholly different

agreed with the decision below holding both that (i) exceptions to the Navy's 1972 discharge requirement were limited to instances of "military necessity," and (ii) the Secretary need not explain why a discharged homosexual does not fall within that extremely narrow category.

In any event, whatever distinctions may once have existed are no longer of importance. Subsequent to petitioner's discharge the Navy twice has revised its homosexual discharge regulations to make clear under what circumstances, in addition to "military necessity," a service member could expect to be retained. The first revision occurred in 1978, when the Navy formally established a limited exception to mandatory exclusion of service members who engage in homosexual acts, applicable where the homosexual conduct constituted a single isolated act, where the service member did not profess or demonstrate proclivity to repeat such an act, and where retention of the service member would not adversely affect either the performance of the individual's duties or the readiness, efficiency or morale of his unit (Pet. App. 137a-138a).

The second revision occurred in 1981 in order to implement DOD Directive 1332.14 (16 Jan. 1981), 46 Fed. Reg. 9571 (1981), which imposes upon all military departments a uniform policy governing the discharge of homosexuals. The Secretary of the Navy's instruction implementing this

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regulation. Unlike SECNAVINST 1900.9A, the applicable Air Force regulation contained an express grant of discretion to retain homosexuals. It provided for "a general policy of discharging Air Force members determined to have performed homosexual acts. Exceptions to the policy were contemplated if 'the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised' " (*Matlovich* v. *Secretary of the Air Force*, *supra*, 591 F. 2d at 853 n.1). Nonetheless, *Berg* and *Matlovich* were consolidated for argument on appeal, and the services' position was that the same discretion was vested in each of them. See Brief for Appellees in *Berg* v. *Claytor*, No. 77-1785 (D.C. Cir.), at 50-51. See also *Ashton* v. *Civiletti*, 613 F. 2d 923, 928 (D.C. Cir. 1979).

directive makes discharge mandatory for admitted homosexuals (unless the admission is disproved) and service members who have married or attempted to marry a person of the same sex. It also establishes limited grounds for retention of a service member who has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts. In these circumstances, under the current instruction a service member will be retained only if it is found that (i) the conduct was a departure from his usual behavior, is unlikely to recur, and was not accomplished by force, coercion, or intimidation during the service member's period of military service, (ii) retention of the service member would be consistent with the interest of the naval service in proper discipline, good order and morale, and (iii) the service member does not desire or intend to engage in homosexual acts. Finally, the revised instruction expressly recognizes the power of the Secretary to suspend separation "for a limited period of time in the interests of national security." SECNAVINST 1900.9D (12 Mar. 1981).[4]

Thus, the revision of the Navy regulation has eliminated any prior practical conflict that may have existed. Pursuant to the current Navy policy, a service member, wherever located, will be entitled to retention only if he meets the carefully and narrowly delineated standards set forth in SECNAVINST 1900.9D or if he qualifies for the rare exercise of discretion on "military necessity" grounds. Moreover, any member of the Navy who is discharged under the new regulations will be able to obtain a statement of reasons for his discharge by exhausting his administrative remedies to the Board of Corrections of Naval Records, since a denial of relief by the Board would, in effect, explain that the member's discharge was based on his failure to satisfy the

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[4]A copy of the instruction as revised in 1981 is attached as an appendix to this brief (App., *infra*, 1a-9a).

clearly delineated standards set forth in SECNAVINST 1900.9D.[5]

In these circumstances, no useful purpose would be served by further review of petitioner's discharge. Because the regulation in effect at the time of petitioner's discharge has since been revised twice, a decision in this case is likely to have little continuing significance. Moreover, even if petitioner had received a statement of reasons for the Secretary's refusal to exercise discretion in his case, the ultimate result would be the same: he would have been discharged from the service. Under either the former or the current standard, the Navy plainly had adequate reasons for his nonretention because, by petitioner's own admission (Pet. 6-7), his homosexuality consisted of far more than a single isolated incident, and there is nothing in the record or in petitioner's background to suggest that he was "highly unusual or especially valuable to the Navy" (Pet. App. 102a).

2. Asserting that "[t]he case law is in disarray" (Pet. 22), petitioner urges this Court to consider the question "whether consensual private homosexual conduct is protected by the due process or equal protection clauses of the Federal Constitution." Whatever the state of the law may be concerning that broad question,[6] the court of appeals' narrow holding

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[5]Petitioner also alleges (Pet. 18-20) a conflict among the circuits concerning whether a service member who challenges his discharge on the ground of homosexuality must exhaust his administrative remedies before bringing suit. However, as noted above (see pages 3-4, *supra*), petitioner prevailed on this issue in the courts below (see Pet. App. 92a-95a) and hence received the benefit of the no-exhaustion rule.

[6]The law on that question is not quite as unsettled as petitioner portrays it (Pet. 20-24). In *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976), this Court summarily affirmed a three-judge court's ruling that Virginia's criminal statute prohibiting sodomy constitutionally could be applied to private, consensual homosexual conduct. Petitioner

carefully avoided the issue.[7] The court "decide[d] at the outset that this case does not require us to address the question whether consensual private homosexual conduct is a fundamental right, as that term is used in equal protection and some due process cases" (Pet. App. 111a-112a; footnotes omitted). Rather, the court "concede[d] arguendo that the reasons which led the [Supreme] Court to protect certain private decisions intimately linked with one's personality, *see, e.g., Roe* [v. *Wade*, 410 U.S. 113 (1973)] and family living arrangements beyond the core nuclear family, *see, e.g., Zablocki* [v. *Redhail*, 434 U.S. 374 (1978)] suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challange" (Pet. App. 121a). Nonetheless, it held (*id.* at 122a) that "the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct." The

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relies (Pet. 24), however, on *Carey* v. *Population Services International*, 431 U.S. 678, 694 n.17 (1977), in which the plurality "observe[d] that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." In view of the context in which that observation was made, *i.e.*, a challenge to the sale of contraceptives to minors, it is doubtful that the footnote reference was to private consensual *homosexual* behavior. See 431 U.S. at 718 n.2 (Rehnquist, J., dissenting) ("[w]hile we have not ruled on every conceivable regulation affecting [adult private consensual sexual] conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established. *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976). See *Hicks* v. *Miranda*, 422 U.S. 332, 343-344 (1975)").

[7] As a matter of procedural due process, the court of appeals held (Pet. App. 103a-111a) that petitioner, as a homosexual, had no property interest in continued employment by the Navy in view of the Navy's regulations mandating the discharge of homosexuals, and that the Navy's action did not deprive petitioner of a liberty interest.

court explained that its decision was based largely on the military context of the case (*id.* at 122a-124a, 126a-127a; citations omitted):

> The nature of the employer—the Navy—is crucial to our decision. While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces. As the Court said in *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), the military is "by necessity, a specialized society separate from civilian society." Military services "must insist upon a respect for duty and a discipline without counterpart in civilian life." Regulations which might infringe on constitutional rights in other contexts may survive scrutiny because of military necessities.
>
> * * * * *
>
> Despite the evidence that attitudes towards homosexual conduct have changed among some groups in society, the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties. During the discharge hearings of the plaintiffs, various members who testified on their behalf indicated that while the plaintiffs' homosexuality did not impair the efficiency of the Navy, a member's homosexual conduct might in other circumstances cause difficulties, especially aboard a ship. Similarly, the other concerns expressed by the Navy might not apply

in any particular case, but do have some basis in fact. These considerations are adequate to sustain the regulation in its military context.

See also *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). None of the cases relied on by petitioner (Pet. 22-23) involves the question whether homosexual activity is a legitimate ground for exclusion or discharge from the military.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

DOJ-1981-05

APPENDIX

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20350

SECNAVINST 1900.9D
SO
12 March 1981

SECNAV INSTRUCTION 1900.9D

From: Secretary of the Navy

To: All Ships and Stations

Subj: Policy of the Department of the Navy concerning homosexuality

Ref: (a) SECNAV Instruction 1920.6
(b) DOD Directive 1332.14 of 29 Dec 1976 with Ch-2 of 16 Jan 1981 (NOTAL)

Encl: (1) Procedures applicable to enlisted members

1. *Purpose.* To prescribe policy and procedures applicable to members of the naval service with regard to homosexuality. This policy is applicable to all members of all components of the naval service. The procedures prescribed in enclosure (1) are applicable to enlisted members only.

2. *Cancellation.* SECNAVINST 1900.9C.

3. *Summary of Changes.* This instruction is a complete revision of SECNAVINST 1900.9C. Although there is no change in the Department of the Navy's policy regarding homosexuality, there are significant modifications in definitions, procedures, rules that determine when separation is mandatory and when retention is possible, reasons for separation, characterization of discharges and other areas.

4. *Policy.* Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual

conduct, seriously impairs the accomplishment of the military mission by adversely affecting the ability of the Navy and Marine Corps to maintain discipline, good order and morale, to foster mutual trust and confidence among service members, to insure the integrity of the system of rank and command, to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy, to recruit and retain members of the naval service, to maintain the public acceptability of service in the Navy and Marine Corps and to prevent breaches of security. Such persons shall normally be separated from the naval service in accordance with this instruction.

5. *Definitions.* As used in this instruction:

a. Homosexual means a person, regardless of sex, who engages in, desires to engage in or intends to engage in homosexual acts.

b. Bisexual means a person who engages in, desires to engage in or intends to engage in homosexual and heterosexual acts.

c. A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

6. *Procedure.* A member whose separation is warranted under paragraph 7b of this instruction shall be processed for administrative separation in accordance with applicable regulations. However, nothing herein precludes disciplinary action in accordance with the Uniform Code of Military Justice when such action is determined by proper authority to be appropriate under the circumstances. In this connection, there is no right on the part of any individual to demand trial by court martial in lieu of administrative processing.

a. Inquiry. A commanding officer (as used herein the term commanding officer shall include an officer in charge) who receives apparently reliable information indicating that separation of a member of his or her unit or organization is warranted under paragraph 7b of this instruction shall inquire thoroughly into the matter to determine all the facts and circumstances of the case. Great care and objectivity must be exercised to lawfully develop and document all pertinent facts. All persons involved should be thoroughly questioned and the relevant facts fully recorded. The nearest Naval Investigative Service Office will render professional investigative assistance and advice in appropriate cases. If the assistance of the Naval Investigative Service cannot be obtained in a reasonable time, the commanding officer should nevertheless proceed with the inquiry without delay.

b. Disposition. If, upon completion of the inquiry, the commanding officer determines that there is no probable cause to believe that separation of the member is warranted under paragraph 7b of this instruction, he or she should promptly terminate all action on the case. Otherwise, the commanding officer shall initiate administrative separation proceedings in accordance with applicable regulations. Officers shall be processed in accordance with reference (a). Enlisted members shall be processed in accordance with enclosure (1) to this instruction. The Chief of Naval Personnel and the Commandant of the Marine Corps may prescribe additional procedures consistent with this instruction and references (a) and (b).

7. *Bases for Administrative Separation*

a. A member may be administratively separated from the naval service on the basis of preservice, prior service or current service conduct or statements.

b. A member shall be separated under this instruction if, but only if, one or more of the following three approved findings is made:

(1) The member has engaged in, attempted to engage in or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior; and

(b) Such conduct under all the circumstances is unlikely to recur; and

(c) Such conduct was not accomplished by use of force, coercion or intimidation by the member during a period of military service; and

(d) Under the particular circumstances of the case, the member's continued presence in the naval service is consistent with the interest of the naval service in proper discipline, good order and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

8. *Reason for Separation and Characterization*

a. A Separation Under Other Than Honorable Conditions by reason of Homosexuality shall normally be issued if there is a finding that during the current term of service the member attempted, solicited or committed a homosexual act in one or more of the following circumstances:

(1) By using force, coercion or intimidation;

(2) With a person under 16 years of age;

(3) With a subordinate in circumstances that violate customary military superior-subordinate relationships;

(4) Openly in public view;

(5) For compensation;

(6) Aboard a military vessel or aircraft; or

(7) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order or morale comparable to the impact of such activity aboard a vessel or aircraft.

b. In cases of undisclosed preservice Homosexuality that constitutes a fraudulent enlistment, the reason for and characterization of separation shall be in accordance with regulations governing separation by reason of Misconduct due to procurement of a fraudulent enlistment.

c. In all other cases, separation under this instruction shall be by reason of Homosexuality and the characterization of the discharge shall reflect the character of the member's service.

9. *Other Regulations.* For purposes of interpreting other Navy or Marine Corps regulations (e.g., to determine whether a reenlistment bonus should be recouped or whether separation for medical reasons should take precedence over separation for homosexuality) all separations

under this instruction shall be treated as having been by reason of Misconduct.

10. *Suspension of Separation.* Suspension of a separation by reason of homosexuality or fraudulent enlistment is not authorized when there is an approved finding that one or more of the circumstances identified in paragraph 7b has occurred. However, nothing in this instruction precludes retention of a member, under applicable procedures, for a limited period of time in the interests of national security when authorized by the Secretary of the Navy.

11. *Transition.* A member who has been notified of administrative processing may be processed in accordance with SECNAV Instruction 1900.9C provided that the official letter of notification to the member is dated no later than 30 days after the date of this instruction. In such cases, the Discharge Authority shall process the case in accordance with the guidance contained in and applicable to SECNAV Instruction 1900.9C. In all other cases, processing shall be in accordance with this instruction.

/s/ John Lehman

John Lehman
Secretary of the Navy

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Procedures Applicable to Enlisted Members
Processed under SECNAVINST 1900.9D

1. All enlisted members being considered for separation under this instruction shall have the right to request an Administrative Discharge Board, subject to the following provisions:

a. The Board shall follow Bureau of Naval Personnel Manual or Marine Corps Separation and Retirement Manual procedures, as appropriate, except:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph 7b of this instruction is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described therein.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph 7b has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

b. Normally, the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, is the Discharge Authority. The Discharge Authority shall dispose of the case as follows:

(1) If the Board recommends retention, the Discharge Authority shall:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary of the Navy with a recommendation that the Secretary separate the member for the convenience of the government.

(2) If the Board recommends separation, the Discharge Authority shall:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis that:

1 There is insufficient evidence to support the finding; or

2 There is sufficient evidence to warrant a finding that supports retention under the limited circumstances described in paragraph 7b of this instruction.

(3) If there has been a waiver of Board proceedings, the Discharge Authority shall dispose of the case in accordance with the following provisions:

(a) If the Discharge Authority determines that there is not sufficient evidence to support separation under paragraph 7b, the Discharge Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Discharge Authority determines that one or more of the circumstances authorizing separation under paragraph 7b has occurred, the member shall be separated unless retention is warranted under the limited circumstances described therein.

2. The burden of proving that retention is warranted under the limited circumstances described in paragraph 7b rests with the member except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

3. Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph 7b are required only if:

a. The member, either personally or through counsel, asserts to the Board or, when there has been a waiver of Board proceedings, to the Discharge Authority that one or more such limited circumstances exists; or

b. The Board or Discharge Authority relies upon such circumstances to justify the member's retention.